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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 30.

KEITH MARTIN,
Appellant,

vs.

HERBERT WALTON, As Probate Judge of
Johnson County, Kansas.

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANT'S PETITION FOR REHEARING OR MODIFICATION OF JUDGMENT.

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The appellant petitions the Court for a Rehearing or Modification of the Judgment for the following reasons:

I.

The Decisions Relied Upon by the Court Do Not Support the Dismissal of the Appeal.

The case of Keith Martin has not been considered. The appeal has been dismissed as if the Kansas Supreme Court had made a general rule to cover some evil reasonably appearing to exist and for the sake of expeditious enforcement of the rule had included persons of varying degree of complicity in the evil and none wholly removed from it. Such was the nature of the statutes approved in *Phelps* v. *Board of Education*, 300 U.S. 319, and in *Samuels* v. *McCurdy*, 267 U.S. 188; *Murphy* v. *California*, 225 U.S. 623; *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 60. "Incidental individual inequality" did not make those statutes offensive because some connection was shown between the measures taken by the state and an end which the state had a right to achieve. Furthermore, to have relieved the individual from the scheme would have jeopardized it. *This court has never, until Martin's case, sustained the application of a rule or statute to a person who has no connection with the evils which the rule or statute is designed to prevent or prohibit.*

The Kansas Supreme Court in its opinion, the Attorney General of Kansas in his brief, and the appellee in his, admit that Keith Martin has done none of the things which the Kansas court asserts induced it to amend Rules 41 and 54. The Attorney General in his brief said, "As to his professional qualifications and his personal character there is no question." p. 2. The Kansas court does not say it thinks Martin will ever do any of these things. Had any one of the other lawyers with substantial bi-state practice attacked the constitutionality of the amended rules in the same way that Martin has done, the Kansas court would have been obliged to admit a total

lack of relevant wrongdoing, just as it has done in Martin's case, because the *reasons given by the court to support the amendment have reference to non-resident, out-of-state officed lawyers who do not practice regularly in Kansas* and not to Martin or members of his class. It is unjust to Martin to treat him as if he were merely objecting to being treated as other members of his class. The real issue is whether Martin can be constitutionally penalized by a stigma put on the class to which he belongs where no member of the class has committed a censurable act. Can a class be bad when none of its members are shown to be? *Are not the alleged evils—failure to answer docket calls, inability to procure service, failure to answer calls to appear on matters of urgency, and failure to familiarize oneself with rules of local practice—attributed to the class actually the derelictions of an individual which must be treated as such?* Perhaps the Kansas court was analogizing to the common law on conspiracy. If Martin and others like him are to be punished because they are deemed to be inimicable as a group to the best interests of justice in Kansas, should not the Kansas court be required to establish beyond a reasonable doubt the existence of an intention to conspire to pervert the ends of justice?

Dent v. *West Virginia*, 129 U.S. 114, *Graves* v. *Minnesota*, 272 U.S. 425, and *Hitchcock* v. *Collenberg*, 353 U.S. 919, are not precedents for the Kansas action. In each of these cases the state had imposed general requirements upon *all* practitioners of the particular profession in the state. No assumption was made that one class of practitioners was competent and another incompetent. Every practitioner was made to demonstrate his educational qualifications, or in *Dent*, to show an equivalent in practical experience. No objection could be made to a requirement that all Kansas licensed attorneys demonstrate in some reasonable fashion their actual competency to represent clients before Kansas

courts and administrative agencies. Nor would the Fourteenth Amendment be offended if all Kansas lawyers were required to maintain an office in Kansas where notices and other papers could be sent or served. *But Kansas has not acted by way of general disposition for all. Instead one group of lawyers has been conclusively presumed to be competent without need to demonstrate qualification while another group has been declared incompetent without opportunity to demonstrate competency.*

The factor of incompetency, moreover, is viciously flexible. The group of legal incompetents is subject to augmentation or diminution at the whim of the Kansas court's interpretation of the phrase "regularly practicing." Adjustability *ad hoc* is compatible neither with due process of law nor equal protection of the law. In *Dent* it is declared:

> "It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." 129 U.S. at 124.

II.

The Kansas Court's Findings Cannot Be Given the Respect Accorded to Legislative Fact Findings.

Neither the Attorney General of Kansas, nor the Kansas bar associations, nor the appellee contends that Martin has *not* been deprived of substantial rights. The "local counsel" requirement is not a technical formality which

can be satisfied simply by having a local attorney sign the necessary papers for a negligible fee. *Kansas insists that "local counsel" be present during the entire hearing in court.* For the time which the "local counsel" spends in court he must be compensated. According to the fee schedules of the Johnson and Wyandotte County bar associations in Kansas, he is entitled to one-third to one-half of the fee. No lawyer can afford economically to engage in a practice when he has to share the major part of the emoluments with a "local attorney" for his sitting service. The compulsory presence of "local counsel" is an affront to the integrity and capacity of the Kansas lawyer who must have it and a sign of his unworthiness to his former, present and potential clients. Moreover, the splitting of fees, except for service or responsibility, is considered an unethical practice, Canon 34, but here a court rule forces one Kansas lawyer to share his fees for court appearances with another Kansas lawyer because the "service" is required.

Keith Martin was admitted to practice in Kansas in 1948 after having satisfied the Kansas Supreme Court of his aptitude through the successful writing of an examination which that court thought adequate to test his competency to practice in Kansas. This license was for life and can be taken from him only for just cause. If Martin had been guilty of any of the misconduct which it is now alleged occasioned the 1958 amendments and if statutory disciplinary proceedings had been commenced against him on this account, he would have been entitled to the elementary decencies of due process. He would have had an opportunity to present evidence to rebut the charges against him. He could have been deprived of his rights only for reasons having relevancy to his fitness to practice. *Ex Parte Garland*, 4 Wall. 333; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. It is patent that the state would have failed in an attempt to discipline Martin because he has committed no wrong. It is equally patent that unless

the judgment of the Kansas Supreme Court is reversed, Kansas will have accomplished by subterfuge what it could not do by direct action. Kansas cannot disbar or discipline Martin, and others like him, by individual proceedings against each of them, on the ground that they also practice in Missouri, but the Kansas Supreme Court effectively disbars them by declaring the group, as a group, to be guilty of an offense. The Kansas court does not say they are guilty of the crime of practicing in Missouri, yet this is the crux of the matter. The penalty stricken in *Ex Parte Garland*, 4 Wall. 333, was hardly more arbitrary or less connected with actual competency to practice.

Reasons are assigned for the application of amended Rules 41 and 54 to Martin, which are without logical reference to him or his class. An *ex post facto* finding of fact is indulged in to give color of rationality to the Kansas court's action. *Martin is not permitted to rebut the charges which are indirectly made against him and his class* because the Kansas court purports not to be acting as a court trying him but as a legislative body explaining why it legislated as it did. In form the extravagant and unprecedented judicial notice the Kansas court took may be likened to the legislative finding in the preamble of a statute, to which this Court would be bound by comity to give the highest degree of respect even while entertaining serious doubts as to its well-foundedness, but in substance the court's findings are the rendering of a favorable judgment on itself in a case in which it is unavoidably a party though not named.

Findings of fact under the color of unprecedented judicial notice by the supreme judicial authority of a state, unsupported by evidence in any sense of the concept of evidence in the law, and marshalled by the court alone in support of the court's own arbitrary and capricious rule, leave the citizen, whose rights under the Constitution are in-

fringed, without remedy, if judicial sanction by deference is given by the United States Supreme Court.

The Kansas court is jury, judge, and it would appear executioner, too. The findings of the Kansas court pertain to Martin's constitutional rights in the same degree and in the same manner as if there had been a civil or criminal proceeding against him for misconduct. *Constitutional facts have not been left by the Constitution to the final determination of state tribunals. E. g. Payne* v. *Arkansas*, 356 U.S. 560. *It is the province and duty of the United States Supreme Court to re-examine the state tribunal's findings and to pronounce the violation of the Fourteenth Amendment which those findings were calculated to obscure.*

III.

The Kansas Action, If Sustained, Is Pregnant with Danger to the American System.

Kansas has created a new form of discrimination—discrimination against those who have chosen not to confine their activities to their home state. The Kansas objective is manifestly one of reprisal against lawyers with both in and out-of-state practice in favor of lawyers with only in-state practice and not one of improving the administration of justice in Kansas or of safeguarding the interests of litigants. The appellant would be automatically re-established in good standing and deemed fully competent to practice in Kansas courts were he to surrender the key to his Missouri office and cease to represent clients in Missouri. He would be no more knowledgeable, reliable or meritorious in fact, but abdication of his Missouri practice would be proof satisfactory to Kansas of his fitness.

After thirteen years of continuous practice in Kansas —including representing the State of Kansas (R. 3, *State*

Highway Commissioner v. *Abercrombie*, 185 Kan. 47, 340 P.2d 377), he is now deemed less competent, *by court rule*, than a recent licensee.

Even though Martin has practiced thirteen years in Kansas and his competence is admitted, the Johnson County and Wyandotte County bar associations stand solidly behind denying to Martin his right to practice in Kansas, except on the same basis as a "foreign attorney" (R. 10, 12, 19, 22, 23). What other motivation can there be than the expectation that Martin's Kansas practice will pass to lawyers who practice only in Kansas, since it cannot be anticipated that he will give up his Missouri practice in order to placate Kansas.

If the evils described by the Kansas court as the basis for its amendment of Rules 41 and 54 really exist, why was the court not aware of them in *Dyche* v. *Crawford*, 183 Kan. 441, 327 P.2d 1047, decided *five months* before the amendment? The Kansas court there held that the local counsel requirement of Kansas G.S. 1949, Sec. 7-104, was not applicable to a resident lawyer who had been admitted to practice in Kansas, even though he did not regularly practice in Kansas. Does not the active interest of the various Kansas bar associations in this case make it clear that the real reason for the rule is only economic? If the reason were other than economic, it would seem they would be helping Martin—not fighting him. If the local Kansas bar associations can exclude approximately twenty-five lawyers like Martin, including his co-counsel, F. L. Hagaman, who has been governor of Kansas and who has practiced there over thirty years, they will of course achieve a substantial economic gain.

Discrimination against a lawyer because he practices also in another state is as irrational as racial or religious discrimination and just as pernicious to American ideals.

The Constitution of the United States was proposed and adopted to secure, among other benefits, freedom from barriers to interstate enterprise. This Court has heretofore recognized the vitalness of the freedom to engage in activities outside one's own state, *Allgeyer* v. *Louisiana*, 165 U.S. 578; the necessity for freedom of movement of persons, *Edwards* v. *California*, 314 U.S. 160; and the incompatibility of protective walls to the well-being of the United States, *Baldwin* v. *Seeling*, 294 U.S. 511.

The ruling of Kansas is contrary to the policy of the American Bar Association which has approved of a lawyer practicing in New York and the Virgin Islands.[1] Many

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1. *Virgin Islands Bar Association* v. *Dench*, 215 F.2d 810, 813: "Following the admission of Mr. Dench when, apparently, it became known to the Virgin Islands Bar Association that he was continuing his practice in New York State, Mr. Corneiro, as a member of the Grievance Committee of the Virgin Islands Bar, wrote to Henry S. Drinker, Esquire, of Philadelphia, Chairman of the 'Standing Committee on Professional Ethics and Grievances' of the American Bar Association, and inquired of Mr. Drinker, *inter alia*: 'Would it be unethical, illegal or improper for an attorney admitted to practice in the Virgin Islands but also admitted to practice in New York, to maintain a partnership in New York, while practicing individually in the Virgin Islands(?)'. Mr. Drinker, as Chairman of the Committee, replied: '* * * I see no reason why a lawyer admitted both in the Virgin Islands and in New York, may not maintain an office in each place and have his letters show both offices, provided that his New York office is a *bona fide* office and that he is there from time to time, and available there for consultations.' Mr. Drinker also referred to and quoted Canon 33 of the 'Canons of Practice' of the ABA, which provides that lawyers admitted in different States may be in partnership together, and referred to Opinion 256 of the Committee relating in substance to listing in law directories of members of partnerships not all admitted to practice in the State where the listing is published. The Opinion states that such listings are ethically unobjectionable. The communications to and from Mr. Drinker are part of the record before us."

lawyers and law firms maintain offices in two of our major cities.

If a lawyer may be discriminated against because he engages also in out-of-state practice, there is good reason to suppose that he may be discriminated against for other activities which bear no relation to his competency to practice whenever a sufficiently powerful group finds that its interests lie in having that activity suppressed. Discrimination against a lawyer affects not merely his economic standing but his very ability to function as a lawyer and officer of the court. A lawyer cannot be a fearless, resolute defender of his clients if he is subject to the unbridled whims of a state court exercising its power of control over the Bar. To uphold the Kansas doctrine—the complete subjectability of the Bar to the Bench without even a hearing —violates the Bar's tradition of independence of many centuries.

The impact of sustaining the *Kansas rule of geographical discrimination* will be felt far beyond Keith Martin and the legal profession. If a lawyer may suffer discrimination because he will not consent to limit his practice to the state in which he resides and wherein he has an office, then every profession and calling which is subject to state or municipal licensing, and thus to state control, may be similarly afflicted. The rule, which declares that a lawyer is incompetent merely because he has regular practice outside the state, has its logical counterpart in a regulation which says that a plumber must be joined by a "local plumber" if he "regularly" plumbs in another state (on the ostensible grounds that plumbers are confused by exposure to different building codes and that specialization is needed) or a rule that accountants must not keep books for out-of-state clients where local and state tax laws may differ. Professional engineers, who frequently are

licensed in many states, will be excluded in favor of home-town talent, who know the "local" rules.

CONCLUSION.

For the reasons given, it is submitted that the Court should

1. Sustain this petition for a rehearing to consider the issues raised herein. (Because the impact of this decision is of national importance to the legal profession, the various state and national bar associations, which have become aware of this case since November 6, should be given an opportunity to file briefs *amicus curiae*;) *or*

2. Modify the judgment *per curiam* and hold that Kansas cannot require a regularly practicing Kansas lawyer to be joined with "local counsel" in the Kansas courts (per Mr. Justice Douglas); *or*

3. Modify the judgment *per curiam* and hold that appellant's petition states a cause of action, whereupon appellant and appellee will have to make a record *based on evidence and not on unprecedented judicial notice.*

Respectfully submitted,

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CERTIFICATE.

I hereby certify that the foregoing petition is not filed for delay, but in good faith and for the reasons stated herein.

.....,

F. L. HAGAMAN.